Prof Dato' Dr Rahmat bin Mohamad v Shahizad bin Sulaiman

HIGH COURT (KUALA LUMPUR) — WRIT SUMMON NO WA-23NCVC-28–04 OF 2023
LEONG WAI HONG JC
26 JANUARY 2024

Civil Procedure — Action — Discontinuance of — Application for discontinuance of action with liberty to file afresh — Applicant sought to discontinue defamation suit against defendant with liberty to file afresh — Whether court could impose term 'without liberty to file afresh' on plaintiff who came within O 21 r 2 of Rules of Court 2012 and could discontinue without leave of court

The plaintiff was a former Chairman of Human Rights Commission of Malaysia ('SUHAKAM'). The defendant was a deputy secretary of SUHAKAM, before he requested to be reverted to principal assistant secretary. The defendant complained to various bodies/departments including the Complaints and Monitoring Working Group of SUHAKAM against the plaintiff in respect of the actions of the plaintiff during his tenure as the Chairman of SUHAKAM. The complaints related to alleged acts of interference with appointment procedures, conflict of interest, abuse of power, aggression and bullying towards senior management and officers of SUHAKAM and racism. The plaintiff filed a suit against the defendant for defamation arising from the complaints and requsted SUHAKAM to immediately stop its inquiry into the complaint as required under s 12 of the Human Rights Commission of Malaysia Act 1999 ('the Act'). As a result of the filing of the suit, SUHAKAM citing s 12(3) of the Act informed the defendant that it could no longer continue its investigations into the complaints. However, the plaintiff later informed the defendant that he intended to withdraw the suit and filed a notice of discontinuance to discontinue the suit against the defendant with liberty to file afresh. The plaintiff's ground was that he had filed the notice of discontinuance within the timeline prescribed under O 21 r 2(1) of the Rules of Court 2012 ('the ROC'). The issue for consideration was whether the court could impose the term 'without liberty to file afresh' on the plaintiff who came within O 21 r 2 of the ROC and therefore could discontinue without leave of court.

Held, allowing the discontinuance of the defamation suit with no liberty to file afresh:

(1) The withdrawal of the defamation suit was an abuse of process as the plaintiff arising from the filing of the suit had already obtained a

substantial advantage to the prejudice of the defendant. This was because after the filing of the defamation suit the plaintiff had written to SUHAKAM stating that SUHAKAM was prohibited by s 12(3) of the Act from investigating the complaints and SUHAKAM agreed to stop their enquiry into the conduct of the plaintiff. Additionally, the plaintiff in his supporting affidavit had not stated any reason for seeking a discontinuance of the defamation suit. He had further not given any reason why he sought a withdrawal with liberty to file afresh. His silence did not dispel the suspicion that the filing of the suit was an abuse of process. Therefore, the court could and should impose the term 'without liberty to file afresh on the same matter set out in the present suit' on the discontinuance by the plaintiff (see paras 26–28 & 30).

[Bahasa Malaysia summary

Plaintif adalah bekas Pengerusi Suruhanjaya Hak Asasi Manusia Malaysia ('SUHAKAM'). Defendan adalah seorang timbalan setiausaha SUHAKAM, sebelum beliau memohon untuk dipulangkan ke jawatan ketua penolong setiausaha. Defendan telah membuat aduan kepada pelbagai badan/jabatan termasuk Bahagian Aduan dan Pemantauan SUHAKAM terhadap plaintif berkenaan tindakan plaintif semasa beliau menjawat jawatan Pengerusi SUHAKAM. Aduan ini berkaitan dengan dakwaan tindakan campur tangan dalam prosedur pelantikan, konflik kepentingan, penyalahgunaan kuasa, pelanggaran dan pembulian terhadap pengurusan atasan serta pegawai SUHAKAM, serta perkauman. Plaintif memfailkan saman terhadap defendan atas kesalahan fitnah yang timbul daripada aduan-aduan tersebut dan meminta SUHAKAM untuk segera menghentikan siasatan terhadap aduan itu seperti yang dikehendaki di bawah s 12 Akta Suruhanjaya Hak Asasi Manusia Malaysia 1999 ('Akta'). Hasil daripada pemfailan saman tersebut, SUHAKAM merujuk kepada s 12(3) Akta dan memaklumkan kepada defendan bahawa ia tidak dapat meneruskan siasatan terhadap aduan-aduan tersebut. Walau bagaimanapun, plaintif kemudian memaklumkan kepada defendan bahawa beliau bercadang untuk menarik balik saman dan memfailkan notis penarikan balik untuk menghentikan saman terhadap defendan dengan kebebasan untuk memfailkan semula. Alasan plaintif adalah bahawa beliau telah memfailkan notis penarikan balik dalam tempoh yang ditetapkan di bawah A 21 k 2(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Isu yang perlu dipertimbangkan adalah sama ada mahkamah boleh mengenakan syarat 'tanpa kebebasan untuk memfailkan semula' ke atas plaintif yang termasuk dalam A 21 k 2 KKM dan oleh itu boleh menghentikan tanpa kebenaran mahkamah.

Diputuskan, membenarkan pemberhentian saman fitnah tanpa kebebasan memfailkan semula:

(1) Penarikan semula saman fitnah dianggap sebagai penyalahgunaan proses kerana plaintif, akibat daripada pemfailan saman tersebut, telah

memperoleh kelebihan substansial yang memprejudiskan defendan. Ini kerana selepas pemfailan saman fitnah, plaintif telah menulis kepada SUHAKAM menyatakan bahawa SUHAKAM dilarang oleh s 12(3) Akta daripada menyiasat aduan-aduan tersebut dan SUHAKAM bersetuju untuk menghentikan siasatan terhadap tindakan plaintif. Selain itu, dalam afidavit penyokongnya, plaintif tidak menyatakan sebarang sebab untuk penarikan semula saman fitnah tersebut. Beliau juga tidak memberikan sebarang alasan mengapa beliau memohon untuk menarik balik dengan kebebasan untuk memfailkan semula. Berdiam diri tidak menghapuskan curiga bahawa pemfailan saman itu adalah penyalahgunaan proses. Oleh itu, mahkamah boleh dan harus mengenakan syarat 'tanpa kebebasan untuk memfailkan semula mengenai perkara yang sama yang dinyatakan dalam saman ini' ke atas penarikan semula oleh plaintif (lihat perenggan 26–28 & 30).]

Cases referred to

Hanyo Sdn Bhd v Marplan Sdn Bhd & Ors [1992] 1 MLJ 51, HC (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Mega Crystal Network Sdn Bhd v Yayasan Selangor & Ors [2020] MLJU 133, HC (refd)
Mohd Sumali bin Reduan (bertindak dalam kapasiti sebagai pegawai awam untuk dan bagi pihak Pertubuhan Kebangsaan Melayu Bersatu) & Anor v Shabudin bin Yahaya [2020] MLJU 1908, HC (refd)
Supramaniam a/l Govindasamy v Ravi a/l Govindasamy [2023] MLJU 1844, HC (refd)

Legislation referred to

Human Rights Commission of Malaysia Act 1999 ss 12, 12(3)
Rules of Court 2012 O 21 rr 2, 2(1), 3

Syed Afiq bin Syed Albakri (Zharif Nizamuddin) for the plaintiff.
Gokul Radhakrishnan (Sreenevasan) for the defendant.
Andrew Khoo watching brief for Human Rights Commission of Malaysia.

Leong Wai Hong JC:

INTRODUCTION

[1] The application before me raises an interesting point of procedure. The point being whether the plaintiff one Prof Dato' Dr Rahmat bin Mohamad, who is the former Chairman of Suruhanjaya Hak Asasi Manusia (Human Rights Commission of Malaysia) ('SUHAKAM'), is entitled — *as of right* — to discontinue a writ of summon that he has filed against a senior staff of SUHAKAM with liberty to file afresh on the ground that he has filed his notice

of discontinuance within the timeline prescribed under O 21 r 2(1) of the Rules of Court 2012 ('the ROC'). A

[2] The plaintiff contends that I, namely, the court has no power and jurisdiction to impose terms on his withdrawal once he comes within O 21 r 2(1) of the ROC. He says that I can only impose terms if his withdrawal is pursuant to O 21 r 3 of the ROC. B

[3] In short, the plaintiff contends I cannot order a discontinuance without liberty to file afresh and that the only order I can make is to allow the plaintiff's application to withdraw the writ with liberty to file afresh. C

[4] Counsel has informed me there are no reported cases directly on point. I thank counsel as well as Mr Andrew Khoo holding a watching brief for SUHAKAM for their submissions which have greatly assisted me in arriving at my decision. I heard counsel on 19 January 2024. I reserved decision to 26 January 2024. I now deliver my decision with full grounds. D

BACKGROUND FACTS E

[5] The plaintiff is a former Chairman of SUHAKAM. The plaintiff held this position from June 2022 to 31 August 2023.

[6] The defendant commenced employment at SUHAKAM in 2006 as an Assistant Secretary and since 2014 has been a *Ketua Penolong Setiausaha* (Principal Assistant Secretary) ('KPSU'). F

[7] In November 2022, the defendant was promoted to the position of *Timbalan Setiausaha* (Deputy Secretary) ('TSU') with a six-month probationary period. This is a senior management position. In April 2023, the defendant requested that his position be reverted to KPSU. G

[8] The suit here concerns complaints made by the defendant in respect of the actions of the plaintiff during his time as Chairman of SUHAKAM. H

[9] The complaints relate to alleged acts of interference with appointment procedures, conflict of interest, abuse of power, aggression and bullying towards senior management and officers of SUHAKAM and racism. I

[10] These complaints were submitted to various bodies/departments including the *Bahagian Aduan dan Pemantauan* (Complaints and Monitoring Working Group) of SUHAKAM.

[11] On 26 April 2023, the plaintiff filed the present suit against the defendant for defamation arising from the complaints, in particular the complaint to the Complaints and Monitoring Working Group of SUHAKAM.

[12] On the same day, the plaintiff's solicitors wrote to the Complaints and Monitoring Working Group of SUHAKAM requesting SUHAKAM to immediately stop its inquiry into the complaint to SUHAKAM as required under s 12 of the Human Rights Commission of Malaysia Act 1999.

(See letter from the plaintiff's solicitors to SUHAKAM dated 26 April 2023 at pp 34–35 of the defendant's affidavit in reply/encl 11.)

[13] As a result of the filing of the suit by the plaintiff, SUHAKAM citing s 12(3) of the Human Rights Commission of Malaysia Act 1999 informed the defendant that SUHAKAM can no longer continue their investigations into the defendant's complaint against the plaintiff.

(See letter from SUHAKAM to the defendant dated 23 May 2023 at pp 26–27 of the defendant's affidavit in reply.)

DISCONTINUANCE OF SUIT

[14] At the first case management fixed for this matter on 29 May 2023, the registrar directed that the defence was to be filed on 21 June 2023.

[15] On 20 June 2023, one day before the Defence was due, the defendant's solicitors were notified by telephone and by letter that the plaintiff intends to withdraw the present suit. This was then followed up by the filing of the notice of discontinuance (encl 7) on the same day.

[16] The defendant objected to the notice of discontinuance with liberty to file afresh. Hence the plaintiff filed encl 9 seeking to discontinue the present action against the defendant with liberty to file afresh and with costs to be borne by the defendant.

THE LAW ON THE DISCONTINUANCE OF A SUIT BY A PLAINTIFF

[17] The law on the discontinuance of a suit by a plaintiff is found in O 21 of the ROC. Order 21 r 2(1) of the ROC allows the discontinuance of an action by a plaintiff without the leave of court if the notice of discontinuance is filed not later than 14 days after the service of the defence on the plaintiff. Except as provided under O 21 r 2, a plaintiff needs the leave of court to discontinue his suit and the court can impose terms like no liberty file afresh when a defendant is *dominus litis*.

[18] Order 21 r 2 of the ROC reads as follows:

O 21 r 2 Discontinuance of action without leave

(1) *The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action* or withdraw any particular claim made by him therein, as against any or all of the defendants *at any time not later than fourteen days after the service of the defence on him* or, if there are two or more defendants, of the defence last served, *by serving a notice in Form 32 to that effect on the defendant concerned*. (Emphasis added.)

ISSUE BEFORE ME

[19] The issue before me is whether the court can still impose the term 'without liberty to file afresh' on a plaintiff like the plaintiff here who comes within O 21 r 2 of the ROC and therefore can discontinue without leave of court.

THE LAW ON ABUSE OF COURT PROCESS IN RELATION TO O 21 R 2 OF THE ROC

[20] The starting principle is that a plaintiff who comes within O 21 r 2 of the ROC is entitled, prima facie, to discontinue without leave of court. The court will normally allow the plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. This is because it is not desirable that a plaintiff should be compelled to litigate against his will (see *Hanyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51, Lim Beng Choon J).

[21] As to when a court will compel a plaintiff to litigate against his will, this has been explained in *Hanyo Sdn Bhd v Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51 by Lim Beng Choon J and reproduced in *Supramaniam a/l Govindasamy v Ravi a/l Govindasamy* [2023] MLJU 1844 (HC) by Azizan Md Arshad JC at para 17 as follows:

[17] In *Hanyo Sdn Bhd v Marplan Sdn Bhd 7 Ors* [1992] 1 MLJ 51, the court, after analysing and considering the principles expressed by three cases related to the withdrawal or termination of the action, namely the cases of (i) *Costanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557; (ii) *Covell Mathews & Partners v French Wools Ltd* [1977] 2 All ER 591; and (iii) *Oversea Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, held as follows:

> The principles that can be extracted from the aforementioned cases are that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is cause to the defendant. Injustice would be caused to the defendant if:
>
> (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Costanho v Brown & Root Ltd*;

(2) the discontinuance was not made bona fide by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be dominis litis as the defendant has perfectly good defence — see *Oversea Union Finance Ltd v Lim Foo Chong*; and

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation — see *Covell Matthews & Partners v French Wools Ltd*,

(see also *Crestronics (M) Sdn Bhd lwn Panasonic Manufacturing Malaysia Bhd* [2021] MLJU 2845).

[22] In my view, if a court does not wish to compel a litigant to litigate against his will, the court can still impose the term 'without liberty to file afresh on the same matter set out in the present suit' on a plaintiff who comes within O 21 r 2 of the ROC who can discontinue without leave of court, if the court finds that the discontinuance is an abuse of the process of the court. There will be an abuse of the process of the court if the true purpose for filing the suit is something other than to obtain a remedy provided by law, and the discontinuance of the suit comes after the plaintiff arising from the filing of the said suit has achieved an advantage to the prejudice of the defendant.

[23] Support for this view can be gathered from *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 (CA) at p 645 Gopal Sri Ram JCA, *Mohd Sumali bin Reduan (bertindak dalam kapasiti sebagai pegawai awam untuk dan bagi pihak Pertubuhan Kebangsaan Melayu Bersatu) & Anor v Shabudin bin Yahaya* [2020] MLJU 1908 (HC), Wong Hok Chong JC and *The Malaysian Civil Procedure 2021*, Vol 1 para 21/2/2 Sweet & Maxwell.

[24] This is what the Court of Appeal said in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 (CA) at p 645 via Gopal Sri Ram JCA:

Abuse of process

It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417). *Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court*. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124

Castanho v Brown & Root (UK) Ltd & Anor [1981] AC 557).

A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process. it was there held that whether in a particular case there was an abuse would be a question of fact and degree.

Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. (Emphasis added.)

[25] Another relevant authority is *Mohd Sumali bin Reduan (bertindak dalam kapasiti sebagai pegawai awam untuk dan bagi pihak Pertubuhan Kebangsaan Melayu Bersatu) & Anor v Shabudin bin Yahaya* [2020] MLJU 1908 (HC), where Wong Hok Chong JC said:

No Leave Required

[14] As the defence has not been filed, the plaintiff is entitled to withdraw the writ without leave — that is as of right — without the court imposing any conditions. It is implicit that the plaintiff has liberty to file afresh because the matter has not been decided on the merits and is thus not res judicata. In fact, they could have done so by just serving a notice on the defendant, without the instant application.

[15] It is only where leave is required to withdraw the writ that the defendant may move the court to impose conditions — such as it be withdrawn with no liberty to file afresh. This is not the case here.

Proviso — No Abuse of Process

[16] *The only proviso is that the withdrawal must not be tantamount to an abuse of process, where the plaintiffs have already obtained a substantial advantage in the action to the prejudice of the defendant*. There is no evidence of that here. (Emphasis added.)

APPLICATION OF LAW TO THE FACTS

[26] I have perused the facts. It shows that the withdrawal of the defamation suit is an abuse of process as the plaintiff arising from the filing of the suit has already obtained a substantial advantage to the prejudice of the defendant.

[27] This is because after the filing of the defamation suit on 26 April 2023 the plaintiff's solicitors, on the same day, have written to SUHAKAM stating that SUHAKAM is prohibited by s 12(3) of the Human Rights Commission of Malaysia Act 1999 from investigating the complaints made by the defendant against the plaintiff once the plaintiff has filed a suit against the defendant for lodging the said complaints. It was upon this premise that SUHAKAM on 23 May 2023 agreed to stop their enquiry into the conduct of the plaintiff.

(See letter from the plaintiff's solicitors to SUHAKAM dated 26 April 2023 at pp 34–35 of the defendant's affidavit in reply and letter from SUHAKAM to the defendant dated 23 May 2023 at pp 26–27 of the defendant's affidavit in reply.)

[28] The plaintiff in his supporting affidavit has not stated any reason for seeking a discontinuance of his defamation suit now. He has further not given any reason why he sought a withdrawal with liberty to file afresh. His silence does not dispel the suspicion that the filing of the suit is an abuse of process for the reasons I have stated above.

[29] I also note that in *Mega Crystal Network Sdn Bhd v Yayasan Selangor & Ors* [2020] MLJU 133 (HC), Julie Lack JC refused to grant liberty to file afresh as the plaintiff there failed to provide good reasons for the discontinuance.

[30] It is therefore right that the court can and should impose the term 'without liberty to file afresh on the same matter set out in the present suit' on the discontinuance by the plaintiff here. As stated by the Court of Appeal in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 (CA) at p 645 via Gopal Sri Ram JCA, the court must be vigilant to ensure that its process is not abused by a litigant.

[31] To allow a discontinuance with liberty to file afresh, when there has been an abuse of the process, would make a mockery of the law such that right-thinking members of the public will think 'The law is an ass — an idiot', to quote Charles Dickens' memorable phrase in his novel *Oliver Twist*.

DECISION

[32] I allow the discontinuance with no liberty to file afresh on the same matter set out in the present suit. The plaintiff is to pay costs of RM5,000 to the defendant subject to allocatur.

Discontinuance of defamation suit allowed with no liberty to file afresh.

Reported by Nabilah Syahida Abdullah Salleh